Supreme Court, U.S.
FILED
SEP 12 2003
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No. 03-44

In the Supreme Court of the United States

Basim Omar Sabri,

Petitioner,

v.

The United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Respondent's opposition to certiorari does not address the critical reasons why this Court should grant the petition: the courts of appeal are divided on what source of constitutional authority congress had to enact 18 U.S.C. §666 and whether an element requiring a nexus between the alleged bribe and federal funds must be read into 18 U.S.C. §666 to save it from constitutional infirmity. As the petition explains (Pet. at 9) the Court of Appeal's holding here-- that congress lacked the authority under the spending clause (but had it under the necessary and proper clause) to enact section 666 – conflicts with decisions of the Second and Third Circuits. As the petition also explains (Pet. at 9-11) the court of appeals' holding here – that no nexus element is required to save 18 U.S.C. 666 from constitutional infirmity – conflicts with decisions of the Second, Third, and Eleventh Circuits.

Despite Respondent's assertion to the contrary, this case provides the perfect vehicle for this Court to resolve what the petition describes, and the Respondent does not dispute, is a recurring question of fundamental importance to the states and federal government. Despite Respondent's claim this case "lacks the sort of factual development that would permit the Court to address the issue in a sufficiently concrete manner," the issue presented is a legal question and further factual development will not assist the Court in resolving it. The issue has been "developed" because it has been considered and decided by the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal.

Respondent attempts to mislead this Court into denying certiorari by contending that "Respondent (sic) does not directly contest the Court of Appeals' rejection of his facial challenge." (Res. at 9). Respondent's argument misstates the record. The Petition is clear that the issue

presented is a facial challenge to the constitutionality of 18 U.S.C. § 666. (Pet. at 11).

The point of the Petition's reference to the Court of Appeals' split over whether to impose a nexus requirement is that lower courts have been so confused about the constitutionality of 18 U.S.C. § 666, and are so desperately in need of guidance from this Court, that they have been unable to fashion a consistent rationale or result when addressing the issue presented by the Petition. The District Court in this case, and Judge Bye's dissent in the Eighth Circuit Court of Appeals' decision, articulated what Petitioner believes is the correct result -- finding 18 U.S.C. § 666 unconstitutional on its face. Beyond that, it is germane to this Court's certiorari analysis that the Courts of Appeal are deeply divided as to the constitutional rationale for their decisions on the issue presented by the Petition. Worse, the Courts of Appeal are also divided about whether constitutional infirmities in 18 U.S.C. § 666 compel them to read a "nexus" element into the statute in order to save it from constitutional challenge. The radical and multi-pronged divergence of opinion among lower court judges in addressing the issue presented by the Petition leaps out as a justification for this Court to accept certiorari.

2. Respondent devotes a substantial portion of its brief to making the untenable argument that this Court's decisions in United States v. Salerno, 481 U.S. 739 (1987), and Salinas v. United States, 522 U.S. 52 (1997), read together, foreclose a facial constitutional challenge to 18 U.S.C. §666.

Respondent claims Salerno says a statute can only be declared unconstitutional "on its face" where it is established that no set of circumstances can exist under which the act is valid is wrong. (Res. at 7). Salerno did say that, but this Court has all but abrogated the Salerno dicta upon which the Respondent bases its argument. Justice Stevens described the current status of the Salerno dicta, concurring in the denial of certiorari in Janklow v. Planned Parenthood, 517 U.S. 1174 (1996):

> Part II of the [Salerno] opinion [opens] with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases.
>
> While a facial challenge may be more difficult to mount than an as applied challenged, the dicta in Salerno "does not accurately characterize the standard for deciding facial challenges," and "neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles." For these reasons, Salerno's rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context.

Janklow, 517 U.S. at 1175 (Stevens, J., concurring) (quoting Dorf, *Official Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236, 238 (1994); other citations omitted.)

The majority opinion in City of Chicago v. Morales, 527 U.S. 41 (1999), echoed Justice Stevens' disdain for Salerno.

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in

> any decision of this Court, including Salerno itself...

Morales, 527 U.S. at 55 n. 22. In fact, the only reason this Court has not explicitly overruled Salerno is that "[no] federal court has ignored the appropriate principle and applied the draconian 'no circumstance' dictum..." Janklow, 517 U.S. at 1175 (Stevens, J., concurring).

The Respondent's stubborn reliance on the oft-repudiated Salarno dicta is, if anything, another compelling reason to grant certiorari in this case. As the above-cited cases reflect, the Salarno dicta has prompted unwanted confusion among the lower courts. As long as it is permitted to stand without express repudiation, the Salerno dicta poses the risk that lower courts will lapse into error by relying upon it. This case presents an opportunity for the Supreme Court to squarely overrule the troublesome and overreaching dicta of Salerno. That opportunity is another reason for the Court to grant certiorari.

3. Respondent's claim that this Court rejected a constitutional challenge to Section 666 in Salinas is based on dicta in this Court's opinion and not on this Court's actual holding. The language pointed to in Respondent's Brief at page 7 to support this contention is dicta for five reasons:

First, this Court's Order granting Certiorari in Salinas was limited to two issues: whether Section 666 is limited to cases in which the bribe has a demonstrated effect upon federal funds, and an unrelated RICO issue. Salinas v. United States, 519 U.S. 1148 (1997). The Court did not grant certiorari on the question whether 18 USC §666 was a constitutional exercise of the Congress's spending power, and, importantly, the constitutionality of the statute had not been addressed by the lower courts. Id.; United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996).

Second, the issue had not been fully briefed by the petitioner. The spending clause was mentioned only

tangentially in a footnote in the petitioner's brief. This Court had not granted certiorari on this issue. Issues omitted from the grant of certiorari are not considered by the Supreme Court. Sup. Ct. R. 14(1)(a) ("Only the issues set out in the petition, or fairly included therein, will be considered by the Court).

Third, the transcript of the oral argument before this Court in Salinas exposes the flaw in the Respondent's claim. Statements made during oral argument support the conclusion that the constitutionality of Section 666 was not before this Court. The argument shows this Court's unwillingness even to consider the issue. Specifically, the following rebuff of the petitioner's counsel by this Court shows the issue concerning whether Section 666 exceeds congressional authority under the spending clause and the Tenth Amendment was not properly before this Court and was not going to be considered.

> MR. ENRIQUEZ [Counsel for Petitioner]:
> And I understand that--that the government's position on this is that it's under the spending clause and that by virtue of spending, they can go ahead and regulate. But I--I think this goes beyond that cases that they've cited. None of the cases that they have cited on this regulation issue are criminal law cases. All of the cases that they have cited speak in terms of--of conditions or--r incentives to the States. None of them speak in terms of--of something as coercive as, we're going to put your--your officials in jail.
>
> So I--I think, when you get to that point, then we run into a spending clause problem. It doesn't seek to justify itself under the terms of--of the Commerce Clause, and so I think

it does exceed the scope of the Constitution, as applied in this case.

QUESTION: Did you make the argument somewhere else along the line, or did you just today?
MR. ENRIQUEZ: I--I don't know that we argued it terms of Commerce Clause, but we argued in terms of property of the government; that this was protection of property statute, and--and that is could be just--it could be justified only on the basis.

QUESTION: But the Tenth Amendment argument that you're presenting to us now –
MR. ENRIQUEZ: Yes, ma'am.

QUESTION: --did you make that in the lower courts?
MR. ENRIQUEZ: We didn't specifically come out and say Tenth Amendment, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Enriquez. This case is submitted.

Salinas v. United States, No. 96-738, 1997 WL 631057, at 53-55 (United State Supreme Court Official Transcript, Oct. 8, 1997) (emphasis added). This exchange clearly demonstrates that the issue concerning the constitutionality of Section 666 was not before this Court and that this Court did not intend to consider it sua sponte.

Fourth, the analysis in the Salinas opinion makes it clear that Salinas is a statutory construction case. The opinion focuses upon whether the statutory language is ambiguous and whether the language requires a direct connection between federal funds and the bribe. This Court

concluded that the unambiguous statutory language doen not require a direct connection between the federal funds and the bribe. Salinas, 522 U.S. at 61.

Salinas does not even mention congressional authority under the spending clause or constitutional limits under the Tenth Amendment. One would have expected that this Court would have at least acknowledged such concepts before passing on the constitutional questions if that was the Court's purpose. This Court undertook nothing like the constitutional analysis that one would expect if this Court was addressing a constitutional issue. Compare United States v. Lopez, 514 U.S. 549 (1995) (analyzing congressional authority and concluding that the Gun-Free School Zones Act was an unconstitutional exercise of federal power).

Fifth, in the instant case, Mr. Sabri was charged under Section 666 (a)(2). This Court has not specifically addressed this section. This section allows a person to be charged with a federal crime if they attempt to bribe an agent of an organization receiving federal funds, even if they have no other connection to the organization receiving federal funds. By contrast, Salinas addressed Section 666 (a)(1)(B), which involves charges against the agent of the organization receiving federal funds. Thus, the subsection at issue in the instant case pulls in people who are a step further removed from the federal funds. This critical difference has not been addressed by this Court, and provides an additional basis for rejecting the Respondent's argument that the constitutionality of Section 666 was resolved by Salinas.

4. Respondent's attempt to cast Petitioner's argument as one presenting a new issue not raised and decided below is not correct. Petitioner has always maintained Section 666 is unconstitutional on its face because Congress lacked the constitutional authority to enact it. In addition, Petitioner has always maintained the federal courts cannot "save" Section 666 from constitutional infirmity by adding an element Congress did not include. The circuits are split on the issue

of whether a nexus element need be added and clearly require guidance from this Court, but the Petitioner's assertion on these issues has never altered. The Respondent specifically recognizes a "divergence" on this issue. (Res. at 9).

5. The interlocutory nature of this case does not prevent this Court from granting certiorari in this case. Respondent argues that the Court would be in a better position to address this appeal when and if there is a trial, conviction and appeal in the courts below. This argument ignores the fact that the question for this Court is purely legal, is a recurring question of fundamental importance and would not benefit from a more complete factual record. A trial in this case would also be tainted by the error in the Court of Appeals. If a trial is held in this case without Supreme Court review, the district court will not have guidance regarding the unanswered circuit split in this case regarding the elements of the statute.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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